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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 0 4 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company that provides oil removal and surface coating services. It seeks to employ the beneficiary permanently in the United States as a technical manager. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the position's requirements set forth on the labor certification do not require a member of the professions holding an advanced degree and denied the petition on February 26, 2008.

On appeal, counsel asserts that the designation of an advanced degree professional was a clerical error. She maintains that the intended visa preference category for the petition was under section 203(b)(3) of the Immigration and Nationality Act[1] and that the director should have adjudicated the petition under the requested amended Immigrant Petition for Alien Worker (Form I-140) designating this selection, which was submitted before the director's final decision.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In this matter, the petitioner[2] sponsored the alien for a visa under paragraph d of the initial I-140 as a member of the professions holding an advanced degree or an alien of exceptional ability pursuant to section 203(b)(2) of the Act. As the director stated, 8 C.F.R. 204.5(k)(2) provides that "an advanced degree means any degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree

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[1] Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[2] Part 5 of the I-140, which was filed on March 8, 2007, indicates that the petitioner was established on September 24, 1992, employs twelve workers and claims a gross annual income of $4,548,260 and a net annual income of $2,699,054. It must also demonstrate that the beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the ETA Form 9089 is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 9089 was accepted for processing on January 11, 2007.

followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree."

The regulation at 8 C.F.R. § 204.5(k)(4) also provides in pertinent part that the "job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability."

The alien labor certification, Part H, "Job Opportunity Information" describes the terms and conditions of the job offered. The educational, training, and experience requirements are set forth in Part H-4 through 10-B. In this case, under Part H-4, the petitioner designated "none" where asked to designate the minimum level of required education for the job offered. In Part H-6, the petitioner requires 120 months (ten years) of experience in the job offered of technical manager. Part H-8 also indicates that no alternate combination of education and experience is acceptable.[3] The petitioner, however, had requested a visa classification as a member of the professions holding an advanced degree,[4] which, under section 203(b)(2) of the Act, requires a minimum of least a bachelor's degree and 5 years of progressive experience or a master's degree.

The director denied the petition because the labor certification's minimum training and experience requirements do not describe a position that would require at least a bachelor's degree and 5 years of progressive experience or a master's degree requirement. The director

[3] The job duties listed on Part H-11 specify that the applicant will be "[i]n charge of managing the operation team for ORS (Oil Remove System) and surface coating projects, and training new employees and applicators."

[4] The record contains no evidence that the petitioner requested consideration of the beneficiary as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(K)(3)(ii) provides that any three of the following may be accepted as evidence of exceptional ability;

(1) Degree relating to area of exceptional ability;
(2) Letter from current or former employer showing at least 10 years experience;
(3) License to practice profession;
(4) Person has commanded a salary or remuneration demonstrating exceptional ability;
(5) Membership in professional association;
(6) Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organization.

Comparable evidence may be submitted if above categories are inapplicable. This evidence may include expert opinion letters. Additionally, the regulation at 8 C.F.R. 204.5(k)(2)(4)(i) provides that the job offer of the individual labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

concluded that the position was not eligible to be classified as an advanced degree position as the petitioner had requested on the I-140.

Counsel asserts that the director was obliged to consider the amended I-140 for classification as a third preference professional or skilled worker under Section 203(b)(3)(A)(i) or (ii) on appeal.

With respect to the petitioner's request to be considered under the third preference, petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States Citizenship and Immigration Services requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). It is noted that neither the law nor the regulations require the director to consider lesser classifications if the petitioner does not establish the beneficiary's eligibility for the classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. The record shows that the petitioner re-filed another Form I-140 requesting consideration as a professional or skilled worker on March 31, 2008, which was approved. That petition was based on the same labor certification as the labor certification submitted in the instant petition, and had the same priority date. Therefore, the subsequent filed petition's approval under the professional, or skilled worker category, utilizing the same labor certification and priority date, effectively renders this appeal moot.

For the above-stated reasons, the petition's denial is affirmed and the appeal will be dismissed. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.